MOTION FILED
FEB 26 1992

No. 91-1216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES P. SUTHERLAND,

Petitioner,

v.

BRONTE C. SUTHERLAND,

Respondent.

Petition For Writ Of Certiorari To The California Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR *AMICUS CURIAE* THE LINCOLN LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION OF *AMICUS CURIAE* THE LINCOLN LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Comes now The Lincoln Legal Foundation, as *amicus curiae*, and, pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, respectfully moves this Honorable Court for leave to file its Brief in Support of the Petition for Writ of Certiorari *instanter*. In support hereof, movant states as follows:

1. Movant seeks to file a brief *amicus curiae* herein urging this Court to grant a writ of certiorari in order to allow review of questions raised relating to the Contracts Clause of Article I, Section 10, Clause 1 of the United States Constitution.

2. The parties to this cause are adversaries in a matrimonial matter. The questions raised herein respecting the Contracts Clause, however, hold significance far beyond the matrimonial context in which they arise. This *amicus* seeks to offer the Court views on the importance of the case from a perspective that the parties have not addressed and are not likely to address prior to the issuance of a writ.

3. Movant's proposed brief accompanies this motion.

4. Consent to the filing of Movant's brief was given by Michael J. Woodruff, one of Petitioner's counsel, in a letter of February 18, 1992, to the Clerk of the Court.

5. Respondent's counsel did not respond to Movant's requests for consent to the filing of Movant's proposed brief.

6. This motion and the accompanying brief are submitted to the Court in the good faith belief that they will advance and ease the work of the Court, and not for any purpose of delay or of interference with the respective rights and duties of the parties.

WHEREFORE, the *Amicus Curiae*, The Lincoln Legal Foundation, respectfully prays that this Honorable Court will grant it leave to file its Brief in Support of the Petition for Writ of Certiorari *instanter*.

Dated: February 26, 1992.

Respectfully submitted,

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BRIEF FOR *AMICUS CURIAE* THE LINCOLN LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The Lincoln Legal Foundation, as *amicus curiae*, respectfully urges this Honorable Court to grant a writ of certiorari in this cause so that the Court may address a question of considerable national importance: Whether or not a State legislature's enactment of a retrospective statute effectively changing the terms of a specific kind of contract, in this instance a marriage contract, violated the command of the Federal Constitution, in the Contracts Clause of Article I, Section 10, Clause 1, that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

INTEREST OF THE *AMICUS CURIAE*

The Lincoln Legal Foundation ("LLF") is a national, non-profit, non-partisan, public interest law center. It undertakes litigation, administrative proceedings, legal studies, and educational activities in matters promoting political, economic, and civil liberties and preserving constitutional government, including the separation and limitation of government powers.

LLF has a deep interest in defending the United States Constitution as a bulwark of freedoms, recognizing that life, liberty, and property are essential to human happiness and that the freedom to contract—including the right to have contracts unimpaired by unjust State action—is essential to its pursuit. The Framers and Ratifiers of the Constitution were mindful, in James Madison's words, that "[L]aws impairing the obligation of contracts, are contrary to the first principle of the social compact and to any principle of sound legislation." THE FEDERALIST No. 44 282 (J. Madison) (C. Rossiter ed. 1961). LLF seeks the vindication and invigoration of that "first principle".

STATEMENT OF THE CASE

As the facts appear from the decision below in the California Court of Appeal, Pet. App. A., this is a case of a California marriage contracted 27 years before Respondent applied, on January 2, 1990, to California's courts to dissolve the union. At the time that the parties entered into the marriage the contract was governed, insofar as its potential dissolution was concerned, by California Civil Code § 92, enacted in 1872 and last amended in 1941.

Seven years after the parties entered into the marriage contract California passed its 1969 Family Law Act, Calif. Stats. 1969, ch. 1608, p. 3324, §§ 8 *et seq.*, codified at California Civil Code § 4100, effective on January 1, 1970, and subsequently amended. The two laws, as passed by California's legislature, differ significantly on the substance of implied terms of a marriage contract and on the rules governing such a contract's dissolution.

The question before the California courts was whether, in adjudicating the petition for dissolution of the marriage, to apply the law as it was at the time that the contract was made or the law that was passed subsequent to the contract's formation. The court below applied the subsequent law. The question for this Court is whether or not the act of the California legislature, which made the 1969 Family Law Act retroactively applicable to marriage contracts formed before its passage was the passage, of a law "impairing the Obligation of Contracts".

REASON FOR GRANTING THE WRIT

THE JUDICIAL EXCLUSION OF CERTAIN KINDS OF CONTRACTS FROM THE PROTECTIONS OF THE CONTRACTS CLAUSE OF THE CONSTITUTION IS A PERSISTENT DEFECT IN THIS COURT'S JURISPRUDENCE DERIVING FROM DICTA AND INCORRECT READINGS OF THE CONSTITUTION'S TEXT. THIS CASE AFFORDS THE COURT AN OPPORTUNITY TO CURE IT.

Maynard v. *Hill*, 125 U.S. 190 (1888), the sole authority upon which the court below relied to control its disposition of this case, read marriage contracts out of the Contracts Clause of Article I, Section 10, Clause 1 of the Constitution. *Maynard*, in turn, depended solely on Chief Justice Marshall's celebrated dictum in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 517, 629 (1819), a case most emphatically *not* involving a marriage:

> The provision of the constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunals, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it, without the consent of the other, it will be time enough to inquire, whether such an act be constitutional.

Far from a careful inquiry into what, if anything, might distinguish a marriage contract, or elements of it, from contracts "which respect property or some object of value", Marshall's dictum in *Dartmouth College* was nothing more

than a rejection of an argument *ad absurdum* made by counsel. It was decidedly not the pronouncement of a studied qualification upon the general principle emerging from earlier cases decided under the Contracts Clause, that "the words [of the Contracts Clause] themselves . . . are general, and are applicable to contracts of every description." *Fletcher* v. *Peck*, 6 Cranch 87, 137 (1810) (Marshall, C.J.).

Certainly the first reported case decided under the Contracts Clause, *Vanhorne's Lessee* v. *Dorrance*, 2 Dall. 304 (C.C.D. Pa. 1795), and the first case decided by the Supreme Court under it, *Fletcher* v. *Peck*, *supra*, adopted a very broad reading of the Contracts Clause, both as to the meaning of "contracts" and as to the interpretation of "obligation". Thus, in *Fletcher*, a grant of land was found to be a contract that, although "executed" rather than "executory", was nonetheless intinct with obligations: As Marshall put it, "A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. * * * [A] grant is a contract executed, the obligation of which still continues". *Fletcher*, *supra*, at 137. Just as Marshall refused to read executed contracts out of the protections of the Contracts Clause, so he refused to exclude a special category of executed contracts, those to which a State itself was a party. "The words themselves contain no such distinction", he wrote. *Fletcher*, *supra*, at 137.

The reach of Marshall's reading of the Contracts Clause in *Fletcher* was not unconscious. It was very much the subject of an open dialogue on the Court in 1810, and Justice Johnson joined the debate in a separate opinion:

> The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. * * *

> I have thrown out these ideas, that I may have it distinctly understood, that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification had not been adopted in that article of the constitution. There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures. Whether the words, "acts impairing the obligation of contracts," can be construed to have the same force as must have been given to the words "obligation and *effect* of contracts," is the difficulty in my mind.
>
> * * *
>
> I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The states and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet where to draw the line, or how to define or limit the words, "obligation of contracts," will be found a subject of extreme difficulty.

Fletcher, supra, at 144-145 (Johnson, J.).

Yet it was precisely a strong and bright line of limitation drawn between private rights, on the one hand, and the powers of the States, on the other, that Marshall discerned in the Contracts Clause. He saw the Contracts

Clause as a crucial part of a very large and important enterprise, and so, in *Fletcher*, he gave direct answer to Johnson:

> Whatever respect might have been felt for the state sovereignties, it is not to be disguised, that the framers of the constitution viewed, with some apprehension, the violent acts which might grown [*sic*] out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

Fletcher, *supra*, at 137-138. Marshall saw this "bill of rights for the people of each state" in the strictures of Article I, Section 10, Clause 1, fully 58 years before the adoption of the Fourteenth Amendment and three or four generations before the birth of the "Incorporation Doctrine".

That Johnson's cramped reading of the Contracts Clause contradicted the meaning of the text was revealed when Johnson himself, concluding his discussion in *Fletcher* on the point, conflated the Contracts Clause with the Takings Clauses and their effects:

> To give [the Contracts Clause] the general effect of a restriction of the state powers in favor of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the states in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps

> amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.

Fletcher, supra, at 145.

Marshall's point in *Fletcher* is that the magnanimity of the State is irrelevant. The Contracts Clause safeguards *rights* that are assertable against the State, whether the State is trying to rewrite a bargain to which it itself is a party or it seeks, instead, to intermeddle in contracts to which others, and not the State, are parties.

In *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1810), decided earlier in the same term of the Court as was *Fletcher*, this Court refused to allow a State bankruptcy act passed by New York to frustrate the collection of a contractual debt. Writing for the Court, Marshall applied the Contracts Clause and, as if anticipating the handwringing over its meaning that would be exhibited by Justice Johnson in *Fletcher*, went straight to the heart of the matter:

> In discussing the question whether a state is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use—what is the obligation of a contract? and what will impair it?
>
> It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. * * * Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it.

> The words of the constitution, then, are express and incapable of being misunderstood. They admit of no variety of construction. . . .

Sturges, supra, at 197-198. "Yet", Marshall marvelled, "the opinion, that this law is not within the prohibition of the constitution, has been entertained by those who are entitled to great respect, and has been supported by arguments which deserve to be seriously considered." *Sturges, supra*, at 198. He proceeded, of course, to give them serious consideration in the course of dismissing them.

But refusal to accept the plain meaning of the Contracts Clause dies hard, as was the case in *Maynard* v. *Hill, supra*, and, more extensively and significantly, in the *Rent Cases*[1] and *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934).

In *Marcus Brown Holding Co.* v. *Feldman*, 256 U.S. 170 (1921), the Court strained to uphold a State's rent control statutes. Other constitutional objections to rent control acts had been addressed in a companion case, *Block* v. *Hirsh*, 256 U.S. 135 (1921), in which the Court had upheld the rent control law of the District of Columbia, a subsidiary of the Federal Government to which, of course, the Contracts Clause of Article I, Section 10, does not apply. Writing for the Court in *Marcus Brown*, Justice Holmes brushed aside the Contracts Clause with aston-

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[1] *Block* v. *Hirsh*, 256 U.S. 135 (1921) (upholding the constitutionality of the District of Columbia Rent Control Act); *Marcus Brown Holding Co.* v. *Feldman*, 256 U.S. 170 (1921) (upholding the constitutionality of the New York Emergency Housing Laws); and *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U.S. 242 (1922) (again upholding the constitutionality of the New York Emergency Housing Laws).

ishing curtness: "[C]ontracts are made subject to this exercise of the power of the State when otherwise justified". *Marcus Brown, supra* at 198.

It was in *Blaisdell* that anti-textualism on the Court, at least with respect to the Contracts Clause, reached something of an apogee, for it was there that Chief Justice Hughes dispensed with a disciplined search for the meaning of a clause and saw the Court's task, instead, to adjudicate in the spirit, rather than the words, of the Framers, deciding cases as the Framers would have decided them if only they faced "the conditions and outlook" of current times:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.

Blaisdell, supra, at 442-443. Chief Justice Hughes surveyed the "conditions and outlook" of his time and discerned that "there has been a growing appreciation of public needs and of the necessity of finding ground for rational compromise between individual rights and public welfare." *Blaisdell, supra,* at 442. He concluded that it was the function of the Court to strike those rational compromises, and so the Contracts Clause was swept aside by judicial action, "the question [being] no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the structure upon which the good of all depends." *Blaisdell, supra,* at 442.

The effect of these later readings of the Contracts Clause has been its thorough rewriting. Rather than an impediment to State interference with private relations, the Contracts Clause, in Hughes's sight at least, becomes a cipher if one but deems the State (or at least "the structure upon which the good of all depends") to be an implied third party in every contract. Every contract then contains the germs of any implied terms that future assessments of public necessity, as against past exchanges of private rights, may require.

This is a perverse reading of the Contracts Clause and yet it has prevailed, largely unchallenged, for half a century. At least it cannot be said that any legitimate expectations rest on the modern understanding of the Contracts Clause, for the essence of the outlook is that *nothing* may be expected. The construction of a contract is always to be at the pleasure of the public policy-makers of the day, legislative, judicial, or otherwise.

The case at bar involves a contract—the marriage bond—that is supremely binary, where external intrusions by third parties, the State included, should be undertaken only with the greatest hesitation. This is the clear import of a long line of marriage and family law cases in this Court, the leading representatives of which are collected by Petitioner. (Pet. Writ Cert. 2, n.2). This case, accordingly, affords an excellent opportunity for the Court to revisit the atrophied Contracts Clause and restore its health, either by applying it to the facts of this case or by explaining, with precision, the circumstances that remove categories of contracts from the scope of the Clause's protections. The exclusion of some will help define the inclusion of others, and such a task is worthy of the attention of this tribunal.

CONCLUSION

The Lincoln Legal Foundation, as *amicus curiae* respectfully prays that a writ of certiorari issue in this case to the California Court of Appeal and that the Court take up the question of the meaning and application of the Contracts Clause.

Dated: February 26, 1992.

Respectfully submitted,

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